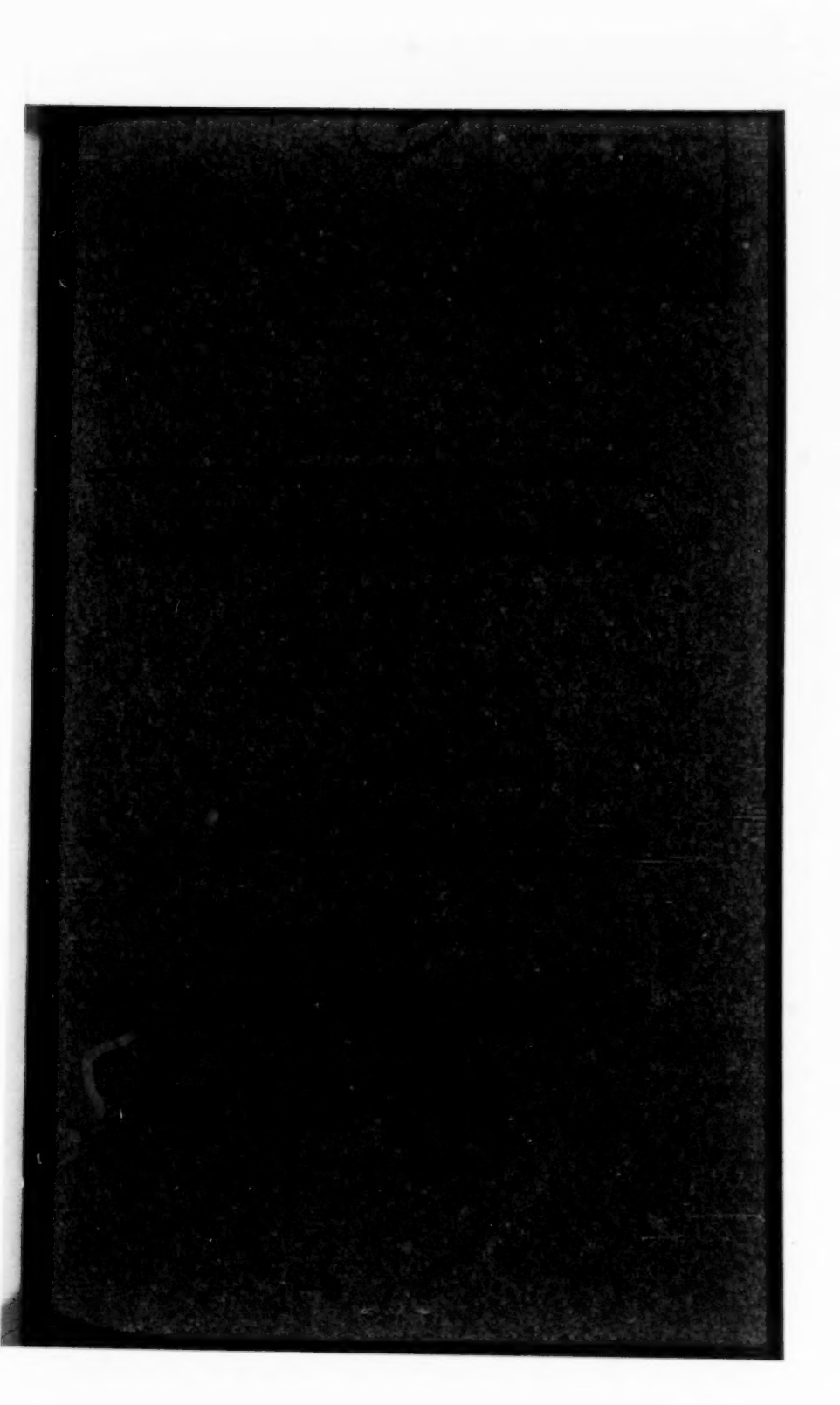

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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 317

CHARLES HAMMER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court is reported in 299 Fed. 1011 and appears in the record at page 53. The opinion of the Circuit Court of Appeals is reported in 6 F. (2nd) 786, and appears in the record at page 67.

JURISDICTION

The judgment of the District Court was entered on May 19, 1924 (R. 46–47), and that of the Circuit Court of Appeals on March 9, 1925 (R. 74–75).

The jurisdiction of this Court was invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

STATEMENT

The petitioner was indicted in the United States District Court for the Southern District of New York under an indictment containing three counts. At the close of the government's case the court directed a verdict of not guilty on the first and third counts. (R. 36-37.) The second count (R. 4–7) alleged, in substance, that Annie Hammer was adjudicated a bankrupt and the proceeding was referred to a referee; that the petitioner " did knowingly, wilfully and corruptly suborn, instigate, induce, and procure " one Trinz to be sworn before the referee and, contrary to his oath, to state material matter which neither the petitioner nor Trinz believed to be true; that Trinz at the instigation and procurement of the petitioner did appear before the referee as a witness and was duly sworn; that it was material in the bankruptcy proceedings whether Trinz had loaned money to the bankrupt and whether the bankrupt had given him a note; that Trinz, in consequence of the subornation, instigation, inducement, and procurement of the petitioner swore that he had loaned the bankrupt money and that she had given him a note; that this was not true and Trinz and the petitioner did not believe it to be true; and that the petitioner knew that Trinz did not believe it to be true.

The jury found the petitioner guilty (R. 46) and the court sentenced him to imprisonment for the term of one year and ten month (R. 47).

THE PETITIONER'S CONTENTIONS

The petitioner urges two contentions as grounds for his claim that the conviction was erroneous:

(1) That a false oath in bankruptcy is not perjury, but a distinct offense, and therefore subornation of a false oath in bankruptcy can not be subornation of perjury.

(2) That there was no proof that Trinz's oath before the referee in bankruptcy was false except the testimony of Trinz himself, and the law requires such falsity to be proved by something more than a single witness.

STATUTES INVOLVED

Section 125 of the Criminal Code (35 Stat. 1111) is as follows:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

Section 29 (b) of the Bankruptcy Act (30 Stat. 554) is as follows, italics indicating the particular portions of the section here involved:

> *A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently* (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) *made a false oath or account in, or in relation to, any proceeding in bankruptcy;* (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forebearing to act in bankruptcy proceedings. (Italics ours.)

Section 126 of the Criminal Code (35 Stat. 1111) is as follows:

> Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in the preceding section prescribed.

Section 332 of the Criminal Code (35 Stat. 1152), is as follows:

Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

ARGUMENT

Summary

I. False swearing in bankruptcy proceedings is perjury. Section 125 of the Criminal Code and Section 29(b) of the Bankruptcy Act should be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty. The two statutes denounce precisely the same offense; they differ only in matters relating to punishment.

II. Even if false swearing in bankruptcy proceedings is not perjury the judgment of conviction may be sustained on the ground that the petitioner was guilty of a violation of Section 29(b) of the Bankruptcy Act, under Section 332 of the Criminal Code, which makes any one who induces or procures the commission of an offense a principal.

III. The evidence was sufficient to sustain the judgment of conviction, although the falsity of the oath alleged to have been suborned was proved only by the uncorroborated testimony of Trinz. It is not clear that the petitioner's objection to the sufficiency of the evidence will be considered by this Court. *Cameron* v. *United States,* 231 U. S. 710.

The authorities against the extension to subornation of perjury of the rule in perjury cases that the falsity of an oath cannot be proved by the uncorroborated testimony of one witness are at least as strong as those for such extension. The only logical reason for the rule in perjury cases is that public policy requires that a witness be protected against a false accusation of perjury on the part of a defeated litigant seeking to revenge himself, and this reason has no application to a case like the present where the perjurer himself testified on the trial of the petitioner that his testimony before the referee in bankruptcy was false.

I

FALSE SWEARING IN BANKRUPTCY PROCEEDINGS IS PERJURY

Under Section 126 of the Criminal Code "whoever shall procure another to commit *any perjury* is guilty of subornation of perjury." The only material inquiry in this case, therefore, is whether false swearing in bankruptcy proceedings is perjury. If it is, it is immaterial whether it is denounced by Section 125 of the Criminal Code or Section 29(b) of the Bankruptcy Act.

The petitioner argues that Section 29(b) of the Bankruptcy Act creates a new offense which is not within the operation of Section 125 of the Criminal Code, and from this draws the conclusion that the new offense is not perjury. The authorities are opposed to each step in this argument.

In *Wechsler* v. *United States* (C. C. A. 2nd Cir.), 158 Fed. 579, the defendant had been convicted of false swearing in a bankruptcy proceeding. He had been tried under the assumption that the indictment was founded on Section 125 of the Criminal Code and an endorsement on the indictment referred to that section, and he was sentenced to punishment allowed by that section but in excess of the punishment authorized by Section 29(b) of the Bankruptcy Act. Apparently both the Government and the defendant contended that Section 29(b) created a new statutory offense; from this the Government argued that the conviction and sentence under Section 125 was proper and the defendant argued that the indictment should have been dismissed because it referred to the wrong statute. The court held that the two sections should be construed together; that the offense committed was within the provisions of Section 29(b) of the Bankruptcy Act, but that this required not a dismissal of the indictment but only a reversal of the judgment below and that the cause be remanded with instructions to enter a new judgment imposing such punishment as was permitted by Section 29(b). On pages 580–581, Judge Lacombe, writing the opinion of the court, after referring to Section 125 of the Criminal Code and Section 29(b) of the Bankruptcy Act, said:

> It is manifest that what the bankrupt did, assuming the facts to be as the jury found them, was equally within the provisions of

either of these sections. He made a false oath in a proceeding in bankruptcy. Having taken an oath before a competent person in a case in which a law of the United States authorizes an oath to be administered that he would testify truly, he stated material matter which he did not believe to be true. When a person states matter which he does not believe to be true "wilfully and contrary to his oath," he may certainly be said to make a false oath "knowingly and fraudulently." We have then an offense covered by two penal sections; the earlier one imposing the heavier sentence. How shall they be construed? The earlier statute is most comprehensive. It covers oral and written false statements when sworn to before any competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered. The later statute covers such statements only when made in, or in relation to, any proceeding in bankruptcy. The principle of construction to be applied, unless there are some special considerations which prevent such application, is too well settled to require the citation of authorities. The later special statute operates to restrict the effect of the general act from which it differs. The two sections may be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty.

In *Epstein* v. *United States* (C. C. A. 7th Cir.), 196 Fed. 354, certiorari denied 223 U. S. 731, the contention of the defendant was precisely similar to that of the petitioner in the present case. The court said (pp. 356-357):

> In the Bankruptcy Act no denunciation or punishment is found for one who suborns another to make "knowingly and fraudulently a false oath or account in, or in relation to, any proceeding in bankruptcy." Therefore, the argument runs, Congress in enacting section 29 of the Bankruptcy Act took out from the definition of perjury as given in the earlier section 5392 the making of a false oath in a bankruptcy proceeding; and since section 5393 covers only those who procure others to commit "perjury" as defined in section 5392, and since subornation of false swearing in bankruptcy proceedings is nowhere specifically condemned, Congress intended that such subornation might be indulged in with impunity.
>
> In our judgment false swearing in bankruptcy proceedings is perjury, nothing more or less. Section 5392 (section 125 of the Penal Code) clearly covers that and every other way of committing the crime. Section 29 of the Bankruptcy Act simply singles out that one form for a milder punishment. Two sections cover the offense, one generically, the other specifically. So the specific section has effect only in restricting punishment. Combined, the effect is ex-

actly as if there were only one section denouncing and punishing perjury, as follows:

"Whoever, having taken an oath * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years: *Provided,* That if the perjury be committed in a bankruptcy proceeding the guilty person shall be punished by being imprisoned not more than two years."

And upon this, which is the legal effect of the two sections, there would be no room for claiming that section 5393 (section 126 of the Penal Code) does not embrace subornation of every sort of perjury.

In *Ulmer* v. *United States* (C. C. A. 6th Cir.), 219 Fed. 641, certiorari denied 238 U. S. 638, the defendant had been convicted of "perjury in the giving of testimony before a referee in bankruptcy regarding a transaction between Ulmer and the bankrupt firm." The indictment contained three counts, all charging substantially the same false statement. The defendant was convicted and sentenced to imprisonment on each count, the sentences being expressly made successive and not concurrent. The aggregate of the three sentences was in excess of that permitted for one crime by Section 29(b) of the Bankruptcy Act, but no more than that permitted for one crime by Section 125 of the Criminal Code. The court held that only one crime

was involved and therefore reversed the sentence and remanded the case for new sentence upon the existing verdict. On pages 647–648 the court said:

> If the indictment and sentence could rightfully be treated as under section 125 of the Penal Code * * * the error inherent in three convictions and three sentences for one crime might be immaterial, because the three sentences would aggregate no greater period than might have been imposed on conviction on one count (*Botsford* v. *United States,* 215 Fed. 510, 515, 132 C. C. A. 22); but the prosecution can not be so considered. Not only does the indictment specify that it is founded on section 29 of the Bankruptcy Act (a consideration not controlling—*Williams* v. *United States,* 168 U. S. 382, 389, 18 Sup. Ct. 92, 42 L. Ed. 509), but it is industriously drawn in the language of the Bankruptcy Act, §29b(2), so as to charge that Ulmer "made a false oath in and in relation to a proceeding in bankruptcy." We approve and adopt the holding of the Second Circuit Court of Appeals in *Wechsler* v. *United States,* 158 Fed. 579, 86 C. C. A. 37, which makes it necessary to regard this prosecution as one under the Bankruptcy Act only, and forbids going to section 125 of the Penal Code for support. From this view, and from the conclusion that only one offense was committed, it follows that imprisonment for more than the two years specified in section 29b was unauthorized.

> This error goes only to the sentence, not to the verdict. It is impossible to allow the *sentence to stand on one* count and set aside the other two sentences, because we can not tell how much imprisonment the district judge would have imposed if proceeding under the theory which we have thought the right one.
>
> We therefore reverse and set aside the sentence and remand the case for new sentence upon the existing verdict.

It is clear that the court approved and followed *Wechsler* v. *United States,* and, in reversing the sentence but not the verdict, held that Section 125 of the Criminal Code and Section 29(b) of the Bankruptcy Act authorized different punishments but did not create different offenses.

The petitioner states that *Kahn* v. *United States* (C. C. A. 2nd Cir.), 214 Fed. 54, certiorari denied 234 U. S. 763, and *Schonfeld* v. *United States* (C. C. A. 2nd Cir.), 277 Fed. 934, certiorari denied 258 U. S. 623, "seem inconsistent with the decision below." In each case the question involved was one of the proof necessary to establish the falsity of testimony given in bankruptcy proceedings in a subsequent prosecution for the giving of such false testimony. In *Kahn* v. *United States* some of the language of the court seems to indicate that it regarded "the crime of false swearing in bankruptcy" as different from "the crime of perjury," but the question was not necessarily involved since the court held that "the ancient rule of the com-

mon law requiring two witnesses to contradict the defendant's oath" in perjury cases "has been practically annulled and at present the rule in several jurisdictions means hardly more than the common-law rule that the defendant must be proved guilty beyond a reasonable doubt," and that "the ancient rule has become inapplicable to modern conditions." It was for this reason that the court refused to apply the common-law rule, rather than because it did not regard false swearing in bankruptcy as perjury, for it said of Section 29 (b) of the Bankruptcy Act (p. 56):

> Of course, broadly stated, this is a perjury statute * * *.

Schonfeld v. *United States* expressly recognized that false swearing in bankruptcy is perjury. The indictment alleged that the defendant "committed perjury in violation of Section 125 of the Federal Criminal Code * * * in that he took an oath before a referee in bankruptcy and testified falsely * * *." In affirming the conviction on this indictment, the court said (pp. 938–939):

> False swearing in bankruptcy is not equal in enormity to the crime of perjury denounced by the general statute. *Kahn* v. *United States*, 214 Fed. 54, 130 C. C. A. 494. The burden of proof required in perjury cases is not applicable to the perjury under the Bankruptcy Act, for the ancient rule of common law requiring two witnesses to contradict the plaintiff in error's oath has been

> practically annulled, and the burden now upon the government is to prove beyond a reasonable doubt the guilt of the plaintiff in error of false swearing.

In addition, several cases, without discussing the statutes involved, have spoken of false swearing in bankruptcy as perjury. *Glickstein* v. *United States*, 222 U. S. 139; *Cameron* v. *United States*, 231 U. S. 710; *Hashagen* v. *United States* (C. C. A. 8th Cir.), 169 Fed. 396; *Daniels* v. *United States* (C. C. A. 6th Cir.), 196 Fed. 459; *Epstein* v. *United States* (C. C. A. 2nd Cir.), 271 Fed 282; *Gordon* v. *United States* (C. C. A. 8th Cir.), 5 F. (2nd) 943.

Not only is the defendant's contention that false swearing in bankruptcy is not perjury without support in the authorities, but in addition the alleged differences between Section 125 of the Criminal Code and Section 29(b) of the Bankruptcy Act do not support the view that the sections create different offenses. The alleged differences are (pp. 10–11 of Petitioner's Brief):

1. The penalties are different.

2. The periods of limitation are different.

3. According to the petitioner "*materiality* is essential to perjury. It is not an element of the offense defined by the Bankruptcy Act."

The first two alleged differences relate only to punishment, not to the elements which constitute the offense. The third alleged difference, accord-

ing to the authorities, does not exist, because materiality *is* an element of the offense defined by the Bankruptcy Act.

Bauman v. *Feist* (C. C. A. 8th Cir.), 107 Fed. 83, 85; *Edelstein* v. *United States* (C. C. A. 8th Cir.), 149 Fed. 636, certiorari denied 205 U. S. 543; *Troeder* v. *Lorsch* (C. C. A. 1st Cir.), 150 Fed. 710, 713; *In re Chamberlain* (D. C. N. Y.), 180 Fed. 304, 309; *In re Gaylord* (C. C. A. 2nd Cir.), 112 Fed. 668; *Baskin* v. *United States* (C. C. A. 7th Cir.), 209 Fed. 740. As said in *Troeder* v. *Lorsch, supra:*

> * * * according to the practical construction of the statute, it is settled that the alleged false oath must contain all the elements involved in perjury at common law, namely, an intentional untruth in a matter material to an issue which is itself material.

We are dealing with the meaning of a statute, and the question whether Congress intended that false swearing in bankruptcy should be considered perjury within the meaning of that word as used in Section 126 of the Criminal Code, making it a crime to procure another to commit perjury. The contention of the petitioner supposes that Congress intended to leave the law in such condition that one who procures false swearing in other than bankruptcy cases is a criminal and must be punished, but one who procures false swearing in bankruptcy is guiltless and commits no offense deserving punishment.

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Common sense requires that such a view be rejected. Congress must have understood that false swearing in bankruptcy is perjury, so that procuring it is punishable under Section 126 of the Criminal Code. Otherwise, it would have enacted additional legislation to cover procuring such false swearing.

II

EVEN IF FALSE SWEARING IN BANKRUPTCY PROCEEDINGS IS NOT PERJURY, THE JUDGMENT OF CONVICTION MAY BE SUSTAINED UNDER SECTION 332 OF THE CRIMINAL CODE AND SECTION 29(B) OF THE BANKRUPTCY ACT

The indictment charged the petitioner with having suborned, instigated, induced, and procured Trinz to make a false oath in a bankruptcy proceeding, and the jury must have found this charge to be true. If false swearing in bankruptcy is not perjury, and the petitioner was therefore not guilty of subornation of perjury under Section 126 of the Criminal Code, there can be no doubt that he was guilty of a violation of Section 29 (b) of the Bankruptcy Act, under Section 332 of the Criminal Code, which makes any one who induces or procures the commission of an offense a principal. The punishment imposed by the court was authorized by Section 29 (b) of the Bankruptcy Act, and the judgment and sentence were therefor proper. It is immaterial that the indictment may have been drawn with a view to Section 126 of the Criminal Code. *Williams* v. *United States*, 168 U. S. 382, 389.

United States v. *Stafoff*, 260 U. S. 477, referred to in petitioner's brief (Brief, p. 33), is in no way inconsistent with this view. In that case it was held that where an indictment charged violation of certain provisions of the revenue laws relating to the production of distilled spirits, a conviction thereunder could not be sustained under the National Prohibition Act. Mr. Justice Holmes, writing the opinion of the Court, said on page 481:

> The indictment plainly purported to be drawn under the old law and it would be unjust to treat the conviction as covering an offense under a law of fundamentally different policy if facts could be spelled out that might fall within the latter, although alleged with no thought of it or any suggestion to the accused that he must be prepared to defend against the different charge.

In the present case Section 125 of the Criminal Code and Section 29 (b) of the Bankruptcy Act are based upon the same policy, to prevent false swearing. The elements constituting the offense of procuring false swearing in bankruptcy proceedings are precisely the same whether such offense be regarded as subornation of perjury, made criminal by Section 126 of the Criminal Code, or procuring a violation of Section 29 (b) of the Bankruptcy Act, made criminal by Section 332 of the Criminal Code. Therefore, it could make no possible difference to the petitioner's rights whether he were prosecuted under one statute or

the other, and the judgment of conviction should be sustained whether or not the trial court was correct in treating the offense committed by the petitioner as subornation of perjury. *Vedin* v. *United States* (C. C. A. 9th Cir.), 257 Fed. 550, certiorari denied 250 U. S. 663.

III

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JUDGMENT OF CONVICTION

The petitioner contends that the evidence was insufficient to sustain the judgment of conviction, because the falsity of the oath alleged to have been suborned was proved only by the uncorroborated testimony of Trinz, who testified that what he swore to before the referee was not true. A precisely similar contention was made in *Cameron* v. *United States,* 231 U. S. 710. See Petitioner's Brief in that case, page 37. The court said (p. 724):

> Other errors are alleged, and it is contended that there was no adequate proof of the charges made, but these questions were submitted to the jury and can not be reexamined here.

It may be admitted as a general rule that the testimony of a single witness as to the falsity of the oath claimed to be perjured is insufficient to warrant a conviction on a charge of perjury. This rule, according to Mr. Justice Wayne, writing the opinion of this Court in *United States* v. *Wood,* 14

Pet. 430, 440, " rests upon the law of a presumptive equality of credit between persons, or upon * * * the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another."

So stated, the rule applies only where " there is merely the oath of one man to be weighed against that of another," and we believe both reason and authority are against its application in a case like the present where the perjurer himself testified on the trial of the petitioner that his previous testimony before the referee was false. As stated in *Boren* v. *United States* (C. C. A. 9th Cir.), 144 Fed. 801, 805, in such a case " the testimony does not consist of the oath of one person against that of the other. The testimony of each witness for the government involves, it is true, the impeachment of his own former sworn statement, but it is direct evidence against the accused as to his instigation of the perjury."

We will examine first the authorities in cases of subornation of perjury with a view to ascertaining whether the rule has been applied in such cases, and, second, certain perjury cases with a view to ascertaining whether the reasons for the rule are applicable in subornation cases and require its extension to such cases.

Cases of subornation of perjury

We have been able to find very few cases in which the question was actually involved whether, in a

prosecution for subornation of perjury, the falsity of the oath claimed to be perjured may be proved by the testimony of a single witness. The only case we have found in which the question was fully considered is *State* v. *Richardson,* 248 Mo. 563. In that case the court held that the court did not err in failing to instruct the jury that in order to find that perjury was committed, they must find that the same was proved by more than one witness, or by one witness corroborated by other facts and circumstances. This holding was not *dictum* as claimed in petitioner's brief (Brief, p. 28). It is true that several witnesses testified to facts which might perhaps have been regarded as corroboration as to the falsity of the oath (pp. 566–567), but the court did not consider the effect of this testimony and the case was submitted to the jury and decided by the appellate court on the theory that corroboration was not necessary, not on the theory that corroboration might be found in this testimony. The reasoning of the court in *State* v. *Richardson* is so conclusive that we think it best to set it forth at length. On pages 570–571 the court said:

> In perjury cases, the rule at common law, and which has been recognized by this court in *State* v. *Heed,* 57 Mo. 252; *State* v. *Faulkner,* 175 Mo. 546, and *State* v. *Hunter,* 181 Mo. 316, is, that the defendant cannot be convicted on the uncorroborated testimony of a single witness, and that it is error for

the court to fail to so instruct. If the same rule is to be invoked in favor of a defendant charged with subornation of perjury, it must be because the reason assigned for the rule in perjury cases exists with like effect in measuring the proof required in subornation cases. And in using this test, it becomes very necessary to inquire into the reason for the rule in perjury cases. The reason for the rule, as stated in *State* v. *Heed*, 57 Mo. l c. 254, is as follows:

"'In proof of the crime of perjury also it was formerly held that two witnesses were necessary, because otherwise there would be nothing more than the oath of one man against another, upon which the jury could not safely convict.' But this strictness has long since been relaxed; the true principle of the law being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence."

Mr. Best, in his work on evidence, gives as a further reason for the rule, that it has a tendency to cause a witness to testify with less apprehension or fear, and that by reason of the rule "little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice." [Best on Evidence, secs. 605, 606; 3 Wigmore on Evidence, sec. 2041.] By what course of logic can these reasons be made to apply to the case of a suborner? Why should the rule as to him be different from that applied

was as unworthy of belief as if he had been convicted and sentenced, and that therefore his testimony was not sufficient, but must be corroborated before the suborner could be convicted. The decision is clearly based not upon the "oath against oath" principle, but upon the court's view, influenced by the statute, that the testimony of the self-confessed perjurer was of little value.

In addition to the above cases, there are certain others in which the question under consideration was referred to although not necessarily involved. Thus in *Boren* v. *United States* (C. C. A. 9th Cir.), 144 Fed. 801, the court found that the testimony as to the falsity of the oaths was corroborated, but said (pp. 805-806):

> It is urged that there is not sufficient evidence to sustain the verdict, for the reason that the proof of each count consists of the testimony of a single witness. It is true that under indictments for perjury the generally accepted rule is that the accused can not be convicted on the uncorroborated testimony of a single witness. The reason assigned is that the same effect is to be given to the testimony of the party accused as to that of the accusing witness, and the proof would be merely the oath of one person against that of another. The reason of the rule in the form in which it is expressed does not apply to a case of subornation of perjury such as the present case for the reason that here the testimony does not consist of the oath of one

person against that of another. The testimony of each witness for the government involves, it is true, the impeachment of his own former sworn statement, but it is direct evidence against the accused as to his instigation of the perjury.

In *Commonwealth* v. *Douglass,* 46 Mass. (5 Metc.) 241, *Stone* v. *State,* 117 Ga. 705, *Bell* v. *State,* 5 Ga. App. 701, STATE v. *Wilhelm,* 114 Kan. 349, and *State* v. *Renswick,* 85 Minn. 19, convictions of subornation of perjury were sustained. In each case the holding was only that the act of subornation may be proved by the uncorroborated testimony of one witness. In each case the court said that the falsity of the alleged perjured oath must be proved by more than such uncorroborated testimony, but in none of the cases was this question involved, and in several of them this dictum was based upon some statute. A similar dictum was contained in *State* v. *Waddle,* 100 Ia. 57, where the prosecution was for an attempt to suborn perjury, which by statute was made a crime although no perjury was committed.

The scope of, and reasons for, the rule in perjury cases

The history of the rule that the testimony of a single witness as to the falsity of the oath claimed to be perjured is insufficient to warrant a conviction on a charge of perjury, is stated in *4 Wigmore on Evidence,* Section 2040 et seq., and it seems un-

necessary to discuss it here at any length. It is sufficient to say that the rule was originally derived from the ecclesiastical law, and that it survived in the common law because, as stated in *4 Wigmore on Evidence,* Section 2040:

> * * * a charge of perjury was the one case where a plausible inducement for such a rule was presented; because in all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence, and thus, if but one witness was offered, there would be merely (as Chief Justice Parker said) oath against oath. Thus, in a perjury case, the quantitative theory of testimony would present itself with the greatest force.

The petitioner's argument, as we understand it, is that the reason for the "oath against oath theory," that is, the quantitative theory of testimony, applies to proof of the fact that perjury was committed in a prosecution for subornation thereof as well as in a prosecution for the perjury itself, and applies to testimony of the perjurer in conflict with his former oath as well as to testimony of another person opposed to the alleged perjured oath. But the same argument would render the quantitative theory of testimony applicable in every criminal case. Since the accused is now competent to testify there is no ground for distinction in applying the quantitative theory of testi-

mony between perjury and other criminal cases. It is admitted that many cases, holding that the testimony of one witness without corroboration is insufficient to prove perjury, state that in such condition of the evidence there is merely oath against oath. No such case, however, so far as we have found, offers any adequate reason for the application of the quantitative theory of testimony in perjury and not in other criminal cases. It is submitted, therefore, that the reference to "oath against oath" in most if not all such cases may fairly be regarded as a mere statement of the rule and not as an endorsement of the quantitative theory of testimony.

Unless the quantitative theory of testimony be regarded as sound when applied to proof of perjury, there is no reason for extending the rule of evidence in perjury cases to cases of subornation of perjury. The only other reason suggested for the rule, so far as we have found, is that it is for the protection of witnesses, since public policy requires that a witness may testify without fear of a false accusation of perjury on the part of a defeated litigant seeking to revenge himself. *4 Wigmore on Evidence,* Section 2041. If the reason for the rule is the protection of witnesses it should not be extended to protect a suborner who is not a witness, and the rule is particularly inapplicable where the perjurer himself testifies to the falsity of his former oath. And, of course, if the rule is

merely historical, with no sound reason to justify it under modern conditions, it should be extended no further than precedent requires.

A majority of the cases in which the question has been fully considered support the view that the quantitative theory of testimony is not a sound reason for the rule in perjury cases. We believe that the question is practically concluded in this Court by the decision in *United States* v. *Wood*, 14 Pet. 430, in which it was held that perjury might be proved by writings emanating from the defendant himself, without the testimony of a living witness. On pages 439–440, the Court said:

> It must be conceded, no case has yet occurred in our own, or in the English courts, where a conviction for perjury has been had without a witness speaking to the *corpus delicti* of the defendant, except in a case of contradictory oaths by the same person. But it is exactly in the principle of the exception, which is by every one admitted to be sound law, that this court has found its way to the conclusion that cases may occur when the evidence comes so directly from the defendant, that the perjury may be proved without the aid of a living witness. * * *
>
> If it be true, then (and it is so), that the rule of a single witness being insufficient to prove perjury, rests upon the law of a presumptive equality of credit between persons, or upon what Starkie terms, the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of an-

> other; satisfy the equal claim to belief, or remove the apprehension, by concurring written proofs, which existed, and are proved to have been in the knowledge of the person charged with the perjury, when it was committed, especially, if such written proofs came from himself, and are facts which he must have known, because they were his own acts; and the reason for the rule ceases.

The petitioner says of this case (Brief, p. 22):

> Modern decisions permit the falsity of the oath to be proved by circumstantial evidence, or by public records, or by writings emanating from the defendant himself * * * since these methods do not involve the balancing of one oath against another * * *.

But the court expressly based its conclusion upon the proposition that perjury may be proved by contradictory oaths of the same person. In other words, the oath against oath principle, or the quantitative theory of testimony, does not apply except where it is unsafe to convict because "there is merely the oath of one man to be weighed against that of another."

Moreover, if the quantitative theory of evidence is the true basis of the rule of evidence, the modern decisions which permit the falsity of an oath to be proved by circumstantial or documentary evidence should require that such evidence be equally strong and convincing as the direct testi-

mony which would be regarded as sufficient proof. Yet many cases permitting proof by circumstantial or documentary evidence hold that the ordinary rule of evidence in perjury cases is not applicable in such a case, and permit conviction whenever the jury is satisfied beyond a reasonable doubt. *People* v. *Doody,* 172 N. Y. 165; *State* v. *Wilhelm,* 114 Kan. 349; *Walker* v. *State,* 19 Ga. App. 98; *State* v. *Cerfoglio,* 46 Nev. 332; *State* v. *Storey,* 148 Minn. 398; *Marvel* v. *State* (Del.), 131 Atl. 317.

In *Marvel* v. *State,* the court criticized severely the old rule that no conviction can be had in a perjury case without the direct evidence of two witnesses or of one witness with corroborating evidence of some character, and, more particularly, the quantitative theory of evidence as a basis for the rule.

The court said (p. 318–319):

> The rule itself when tested by Twentieth Century principles of criminal law and evidence is far from satisfactory, but the reasons underlying the rule are even more unsatisfactory than the rule itself. Perjury (with the exception of treason) is the sole survivor of the common law trials where the quantitative theory of evidence still prevails. In treason the numerical requirement of witnesses is provided by the Constitutions, both State and Federal, and the reasons for the requirement do not apply to cases of perjury.

4 Wigmore on Ev. (Md. Ed.) 2066 et seq.; *Woodbeck* v. *Keller*, 6 Cow. (N. Y.) 118.

It seems unnecessary for us to trace the rule of evidence in perjury cases to its origin in order to show its incongruity to modern conditions. This has been ably done in 4 Wigmore, 2040 et seq. The rule originally prescribed that two witnesses were necessary in order to sustain a conviction for perjury. This requirement was at least consistent with the quantitative theory of evidence. For a long time, however, two direct witnesses have not been required, or as Baron Watson quaintly expressed it in *Reg.* v. *Braethwaite*, 8 Cox Cr. Cas. 254, 444, " that rule has now exploded." Later cases have, however, generally held that one witness giving positive evidence is sufficient if supported by corroborating circumstances. It is apparent that this new rule is at least a partial abandonment of the quantitative theory of evidence and has engrafted on the law of evidence a requirement as to the credibility of evidence, for the circumstantial corroboration which it demands of the positive witness must rest in theory upon the necessity of inducing or compelling a belief in the testimony of the single direct witness.

Almost every case upholding the rule has given as its reason for so holding that otherwise there would " only be oath against oath "; that the oath of the defendant alleged to be perjured is measured against

that of the prosecuting witness; that the scale of evidence is thus poised; and the equilibrium ought to be destroyed by material and independent circumstances before the defendant should be convicted.

This reasoning appears to be vulnerable from several angles. It is based upon the assumption that all oaths are of equal weight. It also assumes that the oath of the defendant given in the former proceeding which is alleged to be false is the defendant's oath in the perjury case on trial. This at least appears doubtful as it seems to make of the defendant a witness in the perjury case without his taking the witness stand and to clothe him with a presumption of truthfulness with no opportunity on the part of the prosecution to attack his credibility. Where the defendant becomes a witness in the perjury case and repeats the alleged false testimony given in the prior proceeding, then there may be oath against oath.

If the consideration of the oath of the defendant in the former trial as his oath in the subsequent perjury trial, without his becoming a witness therein, is founded on the archaic rule of the common law that the defendant was not permitted to testify in his own behalf, then the reasons for such rule have long since disappeared.

Finally it may be pointed out that in all criminal trials in this State the same situation of "oath against oath" may exist and the testimony of a single witness is sufficient to sustain a conviction, the weight

> and credibility of the testimony being questions for the jury to determine. The trial courts of Delaware have repeatedly held that a jury may convict, if it sees fit, upon the uncorroborated evidence of an accomplice being usually cautioned as to the danger of so doing. * * *
>
> It seems to us to approach the very acme of incongruity to hold that homicide, larceny, burglary, and all the crimes embraced in the category of criminal law may be proved by circumstantial evidence, while perjury, which strikes more nearly the vitals of judicial procedure, is alone immune from prosecution under color of a rule, the reasons for which have long ceased to exist. Such holding, it seems to us, has a direct tendency to bring a just reproach upon the administration of criminal law.

State v. *Miller*, 24 W. Va. 802, is also inconsistent with the quantitative theory of testimony. After referring to the common-law rule that in perjury cases the testimony of the prosecuting witness must be corroborated, the court said (pp. 807–808):

> But when the statute permits the defendant to be sworn before the jury in his own defence, as it does in our State in such case, and he avails himself of the right and is examined as a witness in his own behalf, the reason for the rule is gone, and the jury then is the sole judge of the weight to be given to his evidence, and the legal presumption of the truth of his statements previously made is removed, and the manner of the wit-

> ness in giving his evidence may be sufficient corroboration of the evidence of the prosecuting witness. Like any other case under such circumstances, the jury would be the exclusive judge of the credit to be given to the witnesses, and if they find him guilty, this Court could not on well-settled principles disturb the verdict.

Manifestly, to hold that the jury may find corroboration of the prosecuting witness in the manner of the defendant in testifying is in effect to hold that the verdict of the jury is to be based upon the credibility of the witnesses and not upon the number of witnesses on each side.

We think it is clear from the foregoing:

(*a*) That the authorities against the extension to cases of subornation of perjury of the rule in perjury cases that the falsity of an oath can not be proved by the uncorroborated testimony of one witness are at least as strong as those for such extension; and

(*b*) That the only logical reason for the rule in perjury cases is that public policy requires that a witness be protected against a false accusation of perjury on the part of a defeated litigant seeking to revenge himself, and that this reason has no application to a case like the present where the perjurer himself testified on the trial of the petitioner that his testimony before the referee in bankruptcy was false.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

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MAY, 1926.

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